1949

Cache Valley Banking Co. v. Cache County Poultry Grower's Association and Utah Poultry & Farmers Cooperative : Brief of Respondent

Utah Supreme Court

In the Supreme Court
of the State of Utah

CACHE VALLEY BANKING COMPANY, a Utah corporation, as Executor of the Last Will and Testament of WILFORD F. BAUGH, Deceased,

Plaintiff and Appellant,

vs.

CACHE COUNTY POULTRY GROWER'S ASSOCIATION, a corporation, and UTAH POULTRY & FARMERS COOPERATIVE, a corporation,

Defendants and Respondents.

Case No. 7304

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOT THE COUNTY OF CACHE

HON. MARRINER M. MORRISON, *Judge*

IRWIN CLAWSON
Attorney for Defendant and Respondent, Utah Poultry & Farmers Cooperative.

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CASES

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STATEMENT OF FACTS

In general, respondent agrees with appellant's statement of facts but disputes some of the assertions. It is felt that the following facts are supported by the evidence:

On page 4 of appellant's brief it is stated: "There were no marks on the premises to indicate a traveled road . . . "

It was hard surfaced (Tr. 142, 148). It had the appearance of a road (Tr. 134 bottom, 147 bottom) and showed signs of wear where vehicles passed down the roadway (Tr. 141 bottom, 192 bottom, 193, 194). Noth-

ing grew in the roadway (Tr. 134 middle). It was described as a "very good road" (Tr. 147 bottom). Its width was sufficient for two trucks to pass (Tr. 158 bottom, 159). Trucks have a maximum width of 8 feet (Tr. 159). The roadway passed between the scalehouse on the north and the railroad spur track on the south (Tr. 159 top) and the scalehouse was measured to be 17 feet north of the north side of respondent's property. The south edge of the disputed right of way was just north of the respondent's north line (Tr. 194 middle, 200 middle, 201). So much for the question of the evidence of a road.

As to the amount of traffic on the disputed right of way, in and out of the Cache Valley Commission Company's property, the undisputed testimony was that it "was in constant use" (Tr. 107 middle); "It was in heavy use" (Tr. 111 bottom); "It was used every day" (Tr. 112). It appeared ". . . almost like the traffic on Main Street" (Tr. 112 top). ". . . practically everyone . . . who patronized the Cache Commission Co., and that was nearly everybody" used the disputed right of way (Tr. 148 middle). "I would say fifty to a hundred people" and vehicles used the disputed right of way every day (Tr. 149 middle). See also more testimony to the same effect in the Transcript, page 155 (middle), page 169 (top), page 171 (middle), page 175 (bottom), and page 185 (bottom). Carloads of produce were shipped out (Tr. 215, 219, 220). Carloads of supplies

brought in and the outgoing produce was brought into the warehouse, and the incoming supplies were sold to customers who came and went over the disputed right of way.

One more fact which enters into the consideration here is that the Utah Idaho Central Railroad, whose Logan freight yard was finally sold to the plaintiff's testate on Receiver's sale (page 014-016, all references to page numbers in this paragraph are to the abstract of title, Exhibit E) and over the south rod of which the disputed right of way ran, was a weak, sick railroad from its inception. It was first mortgaged in 1915 (page 004), and again in 1920, (page 006) and sold by Receiver's Deed in 1926 (page 007). It was mortgaged again in 1926 (page 010) and sold again by a receiver in 1939 (page 011). It was mortgaged still again in 1939, this time with both a first and a second mortgage (pages 012, 013). The railroad was finally abandoned and its property sold in small parcels by a receiver in the United States District Court in 1947 (pages 014 and 018).

It is said at the bottom of page 5 of the brief that customers had access to Second South at any time. That alley was not opened to traffic at first (Tr. 218); later it was, but was not used very much.

While Mr. Bowen said he didn't intend to acquire a prescriptive easement (Tr. 221), no evidence was introduced of the Cache Valley Commission Company's intention in that regard. This company was a corpora-

tion (Tr. 212 middle). G. B. Bowen was its manager (Tr. 212).

It is stated on page 12 of the brief that there is no evidence that the disputed right of way was used for foot or animal traffic. It was testified that the employees of the respondent's predecessor used the disputed right of way for ingress and egress (Tr. 186 middle). No presumption is known that such employees would be riding rather than walking. And it was used by vehicles (Tr. 110 middle, 186 middle) and by teams (Tr. 110 middle).

It was stipulated that not only the seven witnesses who testified as to the use of the disputed right of way C on Exhibit 3, by the large number of customers of the Cache Valley Commission (predecessor in interest of the respondent) in going to and from that company's place of business, the condition of the roadway and the position of it, but that nine other witnesses would testify to the same things the seven had sworn to (Tr. 190, 191, 192).

ARGUMENT

Appellant bank's first point relates to the shifting of the burden of proof and in support of the claim that the burden did not shift from respondent to appellant, states that there is no evidence that the use of the disputed right of way was adverse or under claim of right or that appellant knew of such facts. (Both the appellant and the respondent are successors in interest to the parties who were the owners at the time the acts referred

to, were done. While the reference to appellant often times actually is to appellant's predecessor, that fact is ignored where not important to the issues of the case.)

NOTORIOUS USE OF RIGHT OF WAY

Let us discuss the last point first that there is no evidence that the appellant knew of the use of this disputed right of way in obtaining ingress and egress to the Cache Valley Commission property. It seems incredible that the railroad could not have known of its use by the Cache Valley Commission employees and customers. As noted in the Facts at the beginning of this brief, that traffic to and from the Commission's property over the disputed right of way was such that the road was in "constant use" (Tr. 107), "heavy use . . . every day" (Tr. 111). "It appeared . . . almost like the traffic on Main Street" (Tr. 112).

> "Actual notice to the owner of the servient estate is not necessary if the user is so notorious that in the exercise of reasonable diligence, the owner should learn thereof; then he will have constructive notice of the user which is sufficient. Dahl v. Roach, 76 Utah 74, 287 P. 622; Bolton v. Murphy, 41 Utah 591, 127 P. 355; Crosier v. Brown, 66 W. Va. 273, 66 S. E. 326, 25. L. R. A. (N. S.) 174; Gardner v. Swann, 114 Ga. 304, 40 S. E. 271; Schulenbarger v. Johnstone, 64 Wash. 202, 116 P. 843, 35 L. R. A. (N. S.) 941; Watson v. Board of County Commissioners, 38 Wash. 662, 80 P. 201; 2 Tiffany on Real Property (2d Ed.), 521."

Jensen v. Gerrard, 85 Utah 481, 39 P(2) 1070, 2. It

would appear from the heavy, constant use that the doctrine of the Jensen case applies here. It can't be claimed that appellant did not know of our use of the disputed right of way.

This brings us to the main point in this case, namely:

OPEN USER FOR THE PRESCRIPTIVE PERIOD RAISES A PRESUMPTION OF ADVERSE CLAIM.

This court, in the case of Zollinger v. Frank, 110 Utah 514, 175 P.(2) 714, quoted with approval the following from 17 Am. Jur. 981, Sec. 72:

> "The prevailing rule is that where a claimant has shown an open, visible, continuous, and unmolested use of land for the period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid the acquisition of an easement by prescription, has the burden of rebutting this presumption by showing that the use was permissive."

In 1 Thompson on Real Property (Perm. Ed.) 718, Sec. 436, the matter is treated thus:

> "The uninterrupted, continued and unexplained, or undisputed use of an alleged easement for the established period of prescription raises a presumption that the use was under claim of right of grant, and the burden is then on the owner of the servient estate to show that the use has been permissive or by virtue of a license."

And the same author, in 2 Thompson Real Property (Perm. Ed.) 114. Sec. 525, further discusses the matter in this way:

"In an action to establish a right of way by prescription, the question is for the jury whether the use was under a claim of right, or was merely a matter of neighborly accommodation. The burden of proof is on the landowner to show that the use of a way over his land, for the prescriptive period, was by license and not adverse. If one uses a road over the land of another, without asking leave and without objection, a grant is presumed: but this presumption may be rebutted in subservience to the title of the owner. 'In the absence of evidence tending to show that such long continued use of the way may be referred to a license, or special indulgence, that is either revocable or terminable, the conclusion is that it has grown out of a grant by the owner of the land and has been exercised under a title thus derived.'"

In 28 C.J.S. 736, the subject is treated thus:

"While the contrary is true in some jurisdictions, sometimes by reason of statute, the general rule is that proof of an open, notorious, continuous and uninterrupted user for the prescriptive period, without evidence to explain how it began, raises a presumption that it was adverse and under a claim of right, or, as is sometimes stated, raises a presumption of a grant, and casts on the owner of the servient tenement the burden of showing that the user was permissive or by virtue of some license, indulgence, or agreement, inconsistent with the right claimed."

This prevailing rule is the law in the State of Utah and is controlling in this case. This court, in Zollinger v. Frank, 110 Utah 514, 175 P.(2) 714, after quoting the

American Jurisprudence statement set forth above, said:

> "We think the better rule is that described as the prevailing rule in the above quotation. That is, where a claimant has shown an open and continuous use of the land for the prescriptive period (20 years in Utah) the use will be presumed to have been against the owner and the owner of the servient estate to prevent the prescriptive easement from arising has the burden of showing that the use was under him instead of against him. This rule was mentioned in the recent case of Big Cottonwood Tanner Ditch Co. v. Moyle, Utah, 159 P. 2d 596, (on rehearing) 174 P. 2d 148, 155, where it was said: 'It is true that to establish an easement the use must be notorious and continuous and on this adverseness —that is, holding against the owner—will be presumed.' See also Northwest Cities Gas Co. v. Western Fuel Co., 13 Wash. 2d 75, 123 P. 2d 771; Eagle Rock Corporation v. Idamont Hotel Co., 59 Idaho 413, 85 P. 2d 242; Fleming v. Howard, 150 Cal. 28, 87 P. 908; Stetson v. Youngquist, 76 Mont. 600, 248 P. 196.
>
> "In this case Zollinger shows and the court found an open and continuous use for the prescriptive period. The presumption that the use was against the landowner therefore arises."

On page 14 of its Brief, the bank seeks to escape the effect of the Zollinger case by reference to Harkness v. Woodmansee, 7 Utah 227, 26 P. 291. In that case, the decision was directed to the question of whether the statutory period for adverse possession applied or the longer 20 year prescriptive rule. After much discussion,

the 20 year rule was applied. Then follows this statement on page 293 (26 P. 293):

> "It is conceded that the use and enjoyment, such as it was, was for less than 20 years, so that period of limitation cannot apply."

This disposed of that case. Incidentally and by way of dicta, the court made the statement quoted on page 14 of the appellant's brief. But it was made with reference to a claim of a 10 foot right of way which was permanently occupied by a platform which jutted out 3 or 4 feet into the passageway and the balance of the proposed right of way was customarily filled by a team that was kept tied to the platform.

Reference is also made to the case of Jensen v. Gerrard, 85 Utah 481, 39 P.(2) 1070, which is likewise unavailing as an authority for the case at bar. In that case, the alleged servient estate owner brought the suit to restrain the defendant from using the roadway. It appeared that plaintiff's predecessor had required and received rent repeatedly for the use of the roadway in question and that such payments had been made within the 20 year period. (The case was decided by the Supreme Court in 1935, and the last cash payment was made in 1916 and permission was sought and obtained for the use of the road in the next year, 1917). Applying the rule established in the Zollinger case, this use was "under" and not "against" the owner of the servient estate and hence could not be the basis for a prescriptive right.

Let us here pause a moment to note that in the case at bar, there was no permission ever sought or obtained (Tr. 117, 136, 149, 166 and 168). No one ever objected to their use of the road (Tr. 136). No barriers were ever erected (Tr. 136, 149, 166). The appellant bank produced the manager of the Cache Valley Commission Company who was such from the time that corporation began its occupancy of the warehouse until it was taken over by the respondent association. He was in a position to state whether there was any writing granting permission to his company. He could also have testified to any parol agreement for the use of the property. He did not do so. We can only surmise that the use was without any permission.

The respondent next refers to the case of Bertolina v. Frates, 89 Utah 238, 57 P.(2) 346, wherein a paragraph is quoted with reference to the effect of the use by others of the right of way and its effect upon those claiming a right growing out of such use. We have no quarrel with the doctrine that the use by third persons of a right of way cannot, generally speaking, inure to the use of the dominent estate tenant. But that rule is subject to limitations which the Bertolina case did not go into because they were not involved in the facts of that case.

RIGHT OF OWNER OF DOMINENT ESTATE TO HAVE THE WAY AVAILABLE FOR USE BY THIRD PERSONS

While it is true, as pointed out in the Bertolina case, that the owner of the dominent estate cannot gain a right of way by showing that third persons had such a right, there are cases where the use made by third persons does inure to the benefit of the owner of the dominent estate. The subject is headnoted in 28 C.J.S. Sec. 90, page 769, thusly:

> "While a private way may not be used by the general public, it may be used by the owner of the way, his family, tenants, servants, and guests, as well as by persons transacting business with him, in the absence of a special agreement to the contrary."

And the same authority follows up this headnote with this language:

> "While a private way may not be used by the public generally or by any one having no better right than the general public, the owner of such a way is not limited to its use by himself, but it may be used by his family, by tenants occupying the land with his authority, by his servants, agents, or employees in conducting his business, by persons transacting business with him, or by guests for social purposes, except in cases where the right of way is created by express agreement and the user is restricted by the terms of the agreement."

A rather recent case involving this extent of user is that of Unverzagt v. Miller, 306 Mich. 260, 10 NW(2)

849, where the defendant owned the fee of the streets of a resort, subject to an easement for use by cottage owners. The defendant sought to collect a license fee from trades people attempting to deliver purchased articles to cottage owners. It was held that she could not do so.

> 851. "This is not a question of the right of outside merchants and tradesmen to use private streets; rather we consider it a question of the right of the cottage owners to have the streets used by those who are invited and requested by cottage owners to make use of the streets for plaintiff's benefit. Such merchants and tradesmen should be considered as invitees of the cottage owners; and under the circumstances of this case, we consider such use reasonably necessary for the use and enjoyment of the easement.
>
> "This does not mean that any and all invitees of a cottage owner may have the right to use the streets. To so hold would mean that a cottage owner might invite the use of the streets by conventions, picnics, assemblies in general . . . As thus limited, the use of the street by merchants and tradesmen will not constitute an unlawful increase of the burden on the servient estate."

The rule was approved by the New Jersey court in Shreve v. Mathis, 63 N.J.E. 170, 52 Atl. 234, where the owner of the dominent estate operated a milk station and used an alley for entrance and exit. The owner of the alley attempted to bar Plaintiff's use except by foot. The court held he could not do so, saying (52 Atl. 238):

> "The way belongs to him as his property.

> All persons having occasion may with his (owner of dominent estate) permission transact business with him by passing to and fro over the way."

The rule has application to all easements, not just those created by grant. In Commonweath v. Buford, 225 Pa. 93, 73 Atl. 1064, the Pennsylvania court applied the rule to a way of necessity. In that case the owners of some coke ovens erected houses which they rented to workmen. They also owned the fee to the streets and did not dedicate them to the public. The Defendant in this case was a tradesman who was arrested for trespass while delivering over these private ways foods which had been ordered. It was held that he was not a trespasser because a way of necessity would be acknowledged, and such way included the right to use the streets by the renter and his family

> " . . . and others who with permission of the tenant visit his home for any lawful purpose."

It is a matter of the type of easement claimed. A right of way for passage by vehicle would not sustain the privileges to put an irrigation ditch upon the same property and convey water in it. And so in the case at bar, it is not a matter of the hundreds of customers gaining a right of way or we gaining their privileges. Rather it is the type of easement claimed, which here is to have a right of ingress and egress over the disputed right of way for the officers and servants and customers of the owner of the dominent estate.

WIDTH OF THE RIGHT OF WAY

On page 17 of the brief, the bank questions the width of the right of way found by the court. As noted supra under the heading of Facts, the undisputed evidence was that the way was wide enough for two trucks to pass (Tr. 158 and 159 bottom). These trucks had a maximum width of 8 feet (Tr. 159). The roadway was south of the scalehouse (Tr. 159 top) which was 17 feet north of the south line of the appellant's property (Tr. 195 top). The south edge of the disputed right of way was just north of appellant's south and our north line (Tr. 194 middle, 200 middle, 201). And it will be remembered that the road was graveled (Tr. 116, 133 171, 200, and 201), had a solid bed to it (Tr. 171), and was hard surfaced (Tr. 142, 148). There was no evidence that the north 4 feet of our property (that lying between the spur and appellant's south property line) had any of those characteristics.

On page 18 of appellant's brief, an attempt is made to distinguish this case from the Zollinger one on the ground that in the latter the right of way was fenced. While there is no particular magic in a fence, so far as that case was concerned, in the case at bar there was an effective barricade between the appellant bank's property and that of respondent, one which would have made the use of the disputed right of way difficult if the railroad had left it that way. I refer to the spur track where the rails projected above the surface of the ground. But

the railroad provided a crossing over this barrier by placing planks so as to render it easily passable.

OBLIGATION TO KEEP TRESPASSERS OUT

At the top of page 19 of appellant's brief and at numerous other places, appellant sets a "man of straw" by saying that if a prescriptive right is thus gained, it would require a public service corporation to hire policemen to keep trespassers off the property and would require a utility to "ride herd" on all persons coming into their freight yards. If appellant was right, it would require similar action by every shopkeeper to eliminate all but those who are determined to buy in his store. But there is no such requirement.

However, when the customers and officers and employees of an adjoining land owner flow over the land of another to the extent of 50 to 100 per day (Tr. 149), until at times the traffic resembled that on Main Street (Tr. 112), and practically everyone in Logan came and went to the Cache Valley Commission Company property over this right of way (Tr. 148), and that flow of traffic was not secretive or unseen but consisted of farmers' teams and wagons and trucks and cars, then the owners whose land is being thus used cannot sit by for twenty-five years and claim that he was required by the nature of his business to permit it and that no prescriptive right had been gained. One just can't sit by and see that stream of traffic flowing to and from the street and the point of crossing of the spur and let it go

on for more than twenty-five years and then attempt to block up that roadway or crossing.

The court and counsel will recall that in some places in Los Angeles, the sidewalks are as broad as those in Salt Lake, while in others they are narrow and terribly congested. It will also be recalled that where the buildings are set back to give that broad way there is a brass band which runs down inside line of the old sidewalk, and in the space between the band and the buildings appears a plate imbedded in the concrete which notifies all that the property inside the brass band is private property and the license to use that private property is revocable at any time.

Frequently we see signs over or at the side of alleyways that the property is private, and the owner can forbid the use of the way to any or all. This was not done.

This public utility had retained attorneys who were leading members of the bar. Those attorneys and the officers and servants of this railroad knew the dangers which result from the long continued use of a right of way much better than the board of directors of the Cache Valley Commission Company. The officers and employees of that public utility knew about rights of way. Their road bed and spurs were constructed on property, much of which was held only under an easement. They were dealing in easements constantly. They handled hundreds of rights of way. They knew of this danger to

their property, this prescriptive right of way, which was building up. They took no steps to prevent it either short of the twenty years or in the years which followed or ever or at all. It is only when a local buyer, acquainted with this long continued use, purchased the land and his heirs desire to get more than their donor paid for that we have this roadway blocked for the first time in about thirty years.

However, before leaving this plea about being required to keep the freight yard open and hence unable to keep out these 50 to 100 teams a day from the Cache Valley Commission Company, let us point out that this fancied obligation of the carrier to the public could not possibly include opening private entrances into the freight yard, nor the placing of heavy planking to enable all this traffic to flow in and out of the disputed highway adjacent to the spur. And the railroad, without hiring policemen or closing their freight yard to the public, could have choked off this growing right by the simple expedient of putting up a fence along their property line between the main building and the warehouse. But instead, it installed heavy plank crossings to facilitate the use of its road.

On page 20 of the appellant's brief, it is urged that it would be incompatible with its duty to serve the public, if the interurban had not permitted the public free access. But no cases are cited to show that railroad must open its property to the public so they may come

on it at any place. Railroads have the same rights as others, to fence their property and keep the public off of it and to set up entrances where the public can be served and to require the public to enter at those entrances if they seek its services.

In the middle of page 20 of its brief, appellant says that if this right of way is granted, it will amount to taking property without due process. It is sufficient answer to that to say that if imposing this burden is taking the property without due process, the same objection could be raised to all prescriptive easements. In view of the fact that no citations are offered or argument made, it may be safe to assert that this claim was thrown in for rhetorical effect only.

Before leaving this portion of the case, it might be well to examine an assumption that the 50 to 100 vehicles that passed over the disputed right of way in going to and from the Cache Valley property could not be distinguished from the heavy traffic flowing in and out of this railroad freight yard. As pointed out under the heading of "Facts," this railroad was no great artery of commerce. It was a poor, sick, little interurban, passing from mortgage to mortgage and from receiver to receiver and from sale to sale. Three times in its brief span of thirty years (which exactly paralleled the use of right of way here) it completed the cycle of mortgage, receivership and sale. The last time, the owners were apparently convinced that the traffic wasn't there to

sustain the business and the sale was not of the railroad in its entirety but by parcels. If the business was that bad, and, if the business furnished the interurban by the owner of the servient estate was as great as the testimony shows (38 cars of apples one time, Tr. 215; other cars of apples, Tr. 220; other cars of seed, Tr. 215; and was considered one of the interurban's "good customers", (Tr. 216), it would appear that this 50 to 100 vehicles a day passing over the disputed right of way to and from the Cache Valley Commission Company (Tr. 149), this traffic like that on Main Street (Tr. 112), must have been conspicuous in th solitude of the freight yard.

NO WAY OF NECESSITY CLAIMED

On page 21 and elsewhere it is hinted that we are grounding our right of way on the necessity of such a road. This is not our contention. We have a passage along the north side of our property where the spur was, and we seek to use that space for the same purpose for which the spur area was used, namely, to load and unload large shipments through the north doorways. Since the disputed right of way has been blocked off, our traffic has used that portion of our land formerly occupied by the spur, as a passageway in lieu of the right of way used for the preceding 30 years. And when big semi-trailers are being loaded and unloaded at the north doors, it is necessary to divert the traffic from even this temporary passageway. But we claim no way of necessity.

We claim a right of way which accrued during 30 years of open, continuous, notorious use which was taken without seeking or obtaining the permission of the interurban.

The case of Savage v. Nielsen, ... Utah ....., 197 P.(2) 117, is cited to the effect that all use of a right of way is not adverse. But the facts there distinguish that case from the one at bar. The predecessor of the owner of the dominent estate testified that he used the road by permission (197 P.(2) 123) and he so continued until 1936. But in our case neither the previous owner of the dominent estate nor its manager testified that permission was ever sought or granted to use the disputed right of way.

On page 23, this thought of permission is dwelt on further, and it is stated that the companies were working together in a friendly fashion. But is a permit to use the roadway, as distinguished from use without a permit, thus leading to a prescriptive right, the only deduction which can be made of such friendship? It probably seemed immaterial to the sick, little interurban whether its big customer gained a prescriptive right or not. Such a right of way would not interefer with the meager traffic into its near empty freighthouse. It would build up this shipper and that in turn would result in more service, for this traffic-starved line. Certainly there is nothing abortive about the deduction that this carrier

was content to let its neighbor and big customer gain a prescriptive right. This was the finding of the court.

And let it not be lost sight of, that this is a law case, and such finding is binding on the appellate court. This rule of law will be discussed further later on.

INTERRUPTION OF USE OF WAY FOR CONVENIENCE OF OWNER OF DOMINENT ESTATE

Reference is made in the bank's brief on the bottom of page 23 to the fact that the use of the right of way was interrupted by the spotting of cars on the spur at crossings A and B. It will be noted that the railroad never placed a barrier on its land to prevent this flow of traffic, but the obstruction referred to by appellant was placed on the land of respondent's predecessor. The spur was on the Cache Valley Commission Company's land (plaintiff's Exhibit I, defendant's Exhibit 3). Also that the obstruction (the spotted cars) was placed there for the convenience of the Commission Company to load its cars and was not the assertion of a right on the part of the railroad that it could cut off use of the right of way (Tr. 220). Furthermore the interruption was for but 3 or 4 days and only in some years (Tr. 219, 220). But our right is not dependent on a use every day.

> "In order to create a right by prescription, the user must be continuous for the statutory period but this requirement does not involve any necessity that the right be exercised constantly for the statutory period but rather that there be

no abandonment of the use or interruption thereof by the owner of the land." 1 Thompson on Real Property (Perm. Ed.) 724, Sec. 439.

REFUSAL OF EVIDENCE ON CROSS EXAMINATION

The court sustained our ojection to the question: "And so far as you know, when you used it and other people used it, it was with the permission of the Railroad Company to facilitate their freight business."

Supposing that the answer had been "yes", what would it have added to the case? It wouldn't have proved that the use was permissive. It would merely have shown that so far as this witness knew, the use was permissive while the fact might be that the use was or was not permissive.

On the other hand, if the answer had been "no", what would have been added to the testimony in the case? None of these three witnesses were submitted for the purpose of testifying as to the consent or the lack of consent of the railroad. Two of them were minor employees of the Cache Valley Commission Company, and the other was merely a customer. The testimony of any arrangements with the Railroad for permission rested in the hands of appellant's witness, the manager of the Cache Valley Commission Company, who did not testify to any permission sought, granted or refused. No one ever asked permission (Tr. 117, 136, 149, 166 and 168). No one ever objected to their use of the road (Tr. 136).

Nor were any barricades ever erected (Tr. 136, 149, 166). It was used as a matter of right (Tr. 149).

Several cases are cited where the trial court refused to permit cross-examination into a state of mind or authority of an actor to perform the act. But that was not the question here. The question was not as to whether these witnesses, in going on the disputed right of way, did so with adverse intent but as to whether the witnesses thought or knew his travel was with the permission of the railroad. It might have been material if the question had been whether they knew of any permission granted, but that wasn't the question. Furthermore, whether they did or did not have an intent to gain an adverse right in going on the disputed right of way would have no bearing on the case. A right of way in them is not claimed. The right sought here is for the owner of the dominent estate to have access for his customers whether they had friendly or hard feelings against the owner of the servient estate. The questions objected to were immaterial and called for conclusions and not facts.

If the questions had been whether the witness knew of a permit from the railroad for such passage, there would be no objection. But the witness's deduction that the passage was with or without the railroad's permission is immaterial, calls for speculation and the exclusion of it would be harmless error.

FRIENDLY RELATIONSHIP AS EVIDENCE OF USE "UNDER" AND NOT "AGAINST" OWNER

On page 23 it is urged that the friendly feeling of cooperation between the utility on the one hand, and the customer on the other, took this case out of the rule because the use, as appellant urges, was permissive. But merely because the use was with the permission of the owner, it does not follow that the use of the right of way was "under" the owner of the servient estate and not "against" him. For instance, in the case of Holm v. Davis, 41 Utah 200, 125 Pac. 403, there was a friendly relationship existing between the owner of the land and the company which operated a mill below his land. The former permitted the latter to build the mill race on the farm in question. No written document was known to have granted that right. Obviously the use must have been with the permission of the owner. But still, was the use "under" or "against" the owner? It was held to be "against" the owner. So the fact that it was permissive does not control but the question of whether the use was "under" or "against" the owner. In this case the court, sitting without a jury, found the use to be against the railroad.

JUDGMENT SHOULD BE AFFIRMED IF THERE IS SUBSTANTIAL EVIDENCE TO SUPORT IT

This is a law case in spite of the injunctive relief sought. This was established in the case of Norback v.

Board of Directors, 84 Utah 506, 37 P.(2) 339 at 344, where the court said:

> "The primary purpose of the instant case is the establishment of an easement" (for a right of way) "based upon an alleged prescriptive user. If Plaintiff fails in this, his cause of action fails. The right of injunction relief cannot come into existence until the easement has been established. This issue the Plaintiff was entitled to have tried to a jury."

And at page 345:

> "A suit to establish an easement is legal. Mason v. Ross, 77 NJE 527, 77 Atl 44."

And again in Jensen v. Gerrard, 85 Utah 481, 39 P.(2) 1070, where the suit was to restrain the use of a roadway, the court said:

> "This being a law case (Norback v. Board of Directors, etc. (Utah) 37 P(2) 339), this court is not permitted under the Constitution or the statutes to weigh the evidence. If there is any substantial competent evidence in the record to support the court's findings or the verdict of the jury, the judgment will not be disturbed in the absence of some error of law prejudicial to appellant. Jenkins v. Stephens, 64 Utah 307, 231 P 112; Brown v. Union Pac. R. Co., 76 Utah 475, 290 P 759."

Then,

> "As this is a law action, the question is not whether the evidence would have supported the decision in favor of appellants, but whether the decision made by the trial court finds support in the evidence. If there is competent credible

evidence to support the findings made by the trial court, then those findings should stand."

In the case at bar, the court found:

> "5. That for more than 25 years preceding the commencement of this action, said Utah Poultry & Farmers Cooperative and its predecessors in interest in the land described in the next preceding paragraph have openly, notoriously, adversely and continuously and without interruptions and with the knowledge of the owner of the property hereinafter described, used the following described servient estate as a roadway for providing access for foot, vehicular and animal traffic for themselves and for their servants, customers and patrons in moving to and from the above described dominant estate referred to in paragraph No. 4; said servient estate is more particularly described as follows:
>
> 'Commencing at a point 177 feet North of the Southeast corner of Block 5, Plat "D", Logan City Survey, and running thence North 16½ feet; thence West 175 feet; thence South 16½ feet; thence East 175 feet to the place of beginning.'
>
> That said use by the defendant and its predecessors in interest was not permissive." (Paragraph 5, Tr. 69).

The evidence is undisputed that the respondent's predecessor used the right of way for more than 25 years without ever seeking or gaining the owner's permission (Tr. 117, 136, 149, 150, 166, and 168). The Cache Valley Commission Company used the road to the extent of 50 to 100 vehicles a day for the entire period. It was never

denied the right to use the road until the property passed from the hands of the railroad to a purchaser who was a resident of Logan and must have known of the long continued use when he bought the property for the evidence showed that everyone in Logan used it (Tr. 148). Now that he has died, the appellant bank has sought to terminate our use of over 25 years.

But as pointed out above, this is a law case, and there is ample evidence to sustain the decision of the lower court. The judgment should therefore be affirmed.

IRWIN CLAWSON

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